No. 10409

In the United States Circuit Court of Appeals for the Ninth Circuit

THOR W. HENRICKSEN, FORMERLY ACTING COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON; AND CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANTS

v.

BAKER-BOYER NATIONAL BANK, A CORPORATION, EXECUTOR OF THE ESTATE OF GEORGE T. WELCH, DECEASED, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

PETITION BY THE APPELLANTS FOR REHEARING

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit and the Judges thereof:

The former Acting Collector of Internal Revenue for the District of Washington and the Collector of Internal Revenue for that District, the appellants herein, respectfully petition this Court to grant a rehearing of the above-entitled cause and to recon-

sider its opinion and decision filed January 5, 1944, and upon such reconsideration to set aside such opinion and decision. In support thereof the appellants respectfully show:

The issue before the Court in this case is whether the bequests to charities were sufficiently definite and ascertainable to be deductible in determining the net estate for estate tax purposes under Section 303 (a) (3) of the Revenue Act of 1926, c. 27, 44 Stat. 9. A question precedent to resolving that issue, as the Court agreed, is the nature of the widow's estate under the will as interpreted in light of state law.

It was held, however, that the decree of distribution approving a stipulated partition of the estate and a later order made by the Superior Court of Walla Walla County, construing the decree of distribution and the will, settled the extent of the widow's interest so as to preclude an interpretation of the will by this Court. That conclusion cannot rest upon the decree of distribution alone, and this Court did not so hold. We shall show that the later order has no bearing upon the question.

1. The final decree of distribution entered by the Superior Court of Walla Walla County sitting in probate (R. 138–164) insofar as it is here relevant merely approved a stipulation (R. 115–136) between the appellee as executor of the estate, and the widow for partition of the estate. If the tax were predicated on what the widow received by agreement, the decree would be relevant. But since the question here is the nature of the interests transferred at the decedent's

death, which the decree did not purport to determine, it is not. *Robbins* v. *Commissioner* 111 F. 2d 828 (C. C. A. 1st); *Watkins* v. *Fly,* 136 F. 2d 578, 580 (C. C. A. 5th); *Helvering* v. *Safe Deposit & Trust Co.,* 121 F. 2d 307, 314–315 (C. C. A. 4th); cf. *Taft* v. *Commissioner,* 304 U. S. 351, 357–358; *Dawson* v. *Commissioner,* 81 F. 2d 16, 17 (C. C. A. 2d). Thus in the *Robbins* case the Probate Court of Middlesex County, Massachusetts, entered a decree probating the decedent's will, issuing letters testamentary to the executors and directing them to administer the estate in accordance with the terms of the will and agreement of compromise. The agreement of compromise provided that Amherst College was to receive $250,000 subject to two life estates. The court held that the present value of the gift to the college was not deductible under Section 303 (a) (3) because (pp. 832–833)—

> it is clear that whatever rights Amherst College has now come to it through the compromise agreement and not under the will of the testator. The compromise agreement is not the will of the testator * * *.

What we have pointed out in no way detracts from the full implication of the line of authority marked by *Freuler* v. *Helvering,* 291 U. S. 35, and *Blair* v. *Commissioner,* 300 U. S. 5, relied on by this Court. It is true that a decision of a state court determining property rights is conclusive on the federal courts in tax litigation but obviously only when the rights so determined are those upon which the tax rests. What

this Court overlooked is that the tax is predicated on what passed at decedent's death, in this case determined by the will, and not by what interests the legatees agreed to accept in lieu thereof.

2. Nor is the order of the Superior Court of Walla Walla County dated March 29, 1940, construing the decree of distribution and the will entered almost two years after the final decree of distribution conclusive here. This Court in its opinion (p. 8) correctly stated a part of our objection to giving any effect here to that decree as follows:

> The appellants complain that the order of the Superior Court of Walla Walla County "insofar as it is relevant here, was a non-adversary proceeding" and that "neither the widow nor the remainder interests [were] a party to the proceeding."

The Court's answer to this contention was—

> It has long been settled that a probate proceeding is one in rem, and that if the statutory provisions regarding constructive service and notice are observed, it is binding upon "all persons in the world" * * *.

And then it pointed to the final decree of distribution which recites that due and legal notice of the hearing had been given by posting and by publication as required by law. But although the Court was indubitably correct that a probate proceeding, where proper notice is given, is binding on everyone, that principle is not an answer to our contention with respect to the order of the Superior Court dated March 28, 1940,

because that order was not entered in a probate proceeding. The proceeding was a suit by the appellee against the State of Washington, Inheritance Tax and Escheat Division. Although the record does not indicate, it was undoubtedly begun by service of process on the state as provided in Remington's Revised Statutes of Washington (Supp.), Sec. 11202–1k. Certainly there is no justification for the assumption that service by publication was had in a proceeding which was ostensibly one to determine the amount of state inheritance taxes owed by the estate and the order of the Court is to be contrasted with the decree of distribution in that it says nothing of any notice having been given to anyone. (Cf. R. 102 with R. 138–139.) Nor can it be assumed that the tax litigation was a part of the earlier probate proceeding in view (1) of Section 11202–1k of Remington's Revised Statutes of Washington (Supp.), which expressly provides that actions may be brought against the state by any interested party to determine whether property is subject to inheritance tax by serving the Tax Commissioner with summons by delivering a copy to the supervisor, and (2) the failure of the probate code to provide for the determination of the amount of inheritance tax owed in the probate proceeding itself. It follows then that the proceeding was not in rem and was not binding on the widow who was not a party. It could not establish her property rights and accordingly has no effect here. See *Security First Nat. Bank of Los Angeles* v. *Commissioner,* 38 B. T. A. 425; *Estate of Lloyd,* 106 Cal. App. 507; *Estate of Rath,* 10 Cal. 2d 399.

3. Even if there had been service on the widow, the order of March 28, 1940, nevertheless was ineffective to establish her interest. The law in the State of Washington as interpreted in an unbroken line of decisions of its Supreme Court, is that after a final decree of distribution has been entered by the probate court, it is final and conclusive unless altered on appeal. In adidtion to the cases cited at pages 10 and 11 of this Court's opinion, see *In re Cogswell's Estate,* 189 Wash. 433; *Coleman* v. *Crawford,* 140 Wash. 117; *Manning* v. *Alcott,* 137 Wash. 13; *Alaska Banking & Safe Deposit Co.* v. *Noyes,* 64 Wash. 672, 676. And this is the law as well after the adoption of the Washington Declaratory Judgment Act (Remington's Revised Statutes, (Supp.), Sec. 784–1), as before. *In re Cogswell's Estate, supra.* Accordingly, the Washington Supreme Court has held that after a final decree has been entered the Superior Court is without jurisdiction to make any changes (*In re Cogswell's Estate, supra*), and obviously if the final decree is conclusive the question of the nature of the widow's estate was moot. (*Alaska Banking & Safe Deposit Co.* v. *Noyes, supra*).

4. Even were the issue not moot, even had the Court jurisdiction to enter the decree of March 28, 1940, and even were the widow a party so that her rights could have been determined, the order of the Court is no more conclusive than the decree of distribution which it purported to interpret. Under the decree of distribution the wife had no power to invade the corpus, but as we have already emphasized, that de-

cree embodied an agreement of the parties as to their interests and not a determination of what passed at decedent's death. If, for the reasons outlined in our discussion of the decree of distribution, that decree is not relevant here, a subsequent order interpreting the decree and the will is similarly irrelevant. Unless the Court in its order of March 28, 1940, was free to ignore the stipulation and consider only the will, its interpretation had to be predicated on the will as embodied in the stipulation. Since there was clearly nothing illegal about the stipulation and decree, nor was any question raised as to its validity, the Court of necessity gave it effect. It was therefore not a construction of the will.

5. Finally, even on the assumption that the decree of distribution and the order of March 28, 1940, construed the interest passing at decedent's death rather than the property which the parties voluntarily agreed to accept, they are not conclusive here. *Freuler* v. *Helvering, supra,* suggested its own distinction in that the Court was careful to point out that (p. 45) "The decree purports to decide issues regularly submitted and not to be in any sense a consent decree." And the courts have consistently distinguished the *Freuler* and *Blair* doctrine where the state court did not purport to consider the case on the merits. *First-Mechanics Nat. Bank* v. *Commissioner,* 117 F. 2d 127, 130 (C. C. A. 3d); *United States* v. *Mitchell,* 74 F. 2d 571, 573 (C. C. A. 7th); *Doll* v. *Commissioner,* 2 T. C. 276, 284; *Journal Co.* v. *Commissioner,* 44 B. T. A. 460, 488; *Morris* v. *Commissioner,* 40 B. T. A. 988,

998; *Security First Nat. Bank of Los Angeles* v. *Commissioner,* 38 B. T. A. 425, *supra.* Cf. *Botz* v. *Helvering,* 134 F. 2d 538, 543–545 (C. C. A. 8th). See also *Scott* v. *Henricksen* (W. D. Wash.), decided May 29, 1941 (29 A. F. T. R. 1465, 1466), an oral opinion of Judge Black who decided the instant case below and in which he clearly recognizes the proposition we urge in a case which was not so clearly a consent decree as the instant one. Thus he stated:

> I am very conscious of the order that was made by the Superior Court, or I might better say the orders—one for eight months and the other extending it for four months additional. Those orders were made in connection with appearances by the counsel for the daughter and by the same identical counsel for the executors. Under such a circumstance I cannot feel that there was any issue presented to the Superior Court to that degree that would require me to hold that the Superior Court established the law in this state on that question. *I am satisfied that the orders were very agreeable to the beneficiaries of the Calvert estate and that same, in fact and equitably, should be binding upon the estate and the beneficiaries thereof as between themselves. I am not willing to concede, however, that the circumstances bind and control the taxing authority of the United States government.* [Italics supplied.]

There is no dispute and there cannot be any on this record that the final decree of distribution, insofar as it defined the widow's interest in the decedent's estate, gave effect to the stipulation of the parties (R.

115–116, 141–142) and was therefore a consent decree. The proceeding in which the order of March 28, 1940 was entered, was in form a contest between the executor and the State of Washington, but the only issue in which the state was interested was whether the charities were located in the State of Washington. The question of the nature of the widow's estate was not in issue under state inheritance tax law and the pleadings, order of the court, and correspondence between the executor and the state makes this clear. (R. 102–104, 166–173, 173–174.)

We are convinced that the opinion of this Court is erroneous because (1) it concluded that the probate decree had some bearing on the issue here, although it approved a voluntary settlement of the parties and did not determine the nature of the estate passing at decedent's death upon which the tax is predicated; (2) it concluded that the order of March 28, 1940, was a determination of the widow's interest because it was in *rem,* which resulted from confusing it with the prior probate decree; (3) under well settled Washington law, the Superior Court was without jurisdiction in any way to alter the prior final decree of distribution and the issue was moot because the final order of distribution was conclusive; (4) even if the Court had jurisdiction to enter its decree of March 28, 1940, it had no more significance than the final decree which it interpreted; and (5) both the decree of distribution and the order of March 28, 1940, were by consent and therefore not binding here. For these reasons and because the question is

of great importance to the revenue, we have felt impelled to depart from our usual policy of not filing petitions for rehearing.

We respectfully urge that a rehearing be granted.

Respectfully submitted.

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Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
IRVING I. AXELRAD,
Special Assistants to the Attorney General.

JANUARY 1944.

CERTIFICATE OF COUNSEL

The appellants herein, by their attorney, hereby certify that in their judgment the foregoing petition is well founded and is not interposed for delay.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1943